

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**FEBRUARY 3, 1998**

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 97-1985-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JUSTIN W. SMITH,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Price County:  
PATRICK J. MADDEN, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Justin Smith appeals a judgment convicting him of sexually assaulting a six-year-old boy. He argues that the trial court erred when it joined that count with three counts of sexual assault with a sixteen-year-old girl. We conclude that the error in joining these offenses was harmless.

Multiple crimes may be tried together if they are similar in character or based on the same act or transaction or constitute parts of a common plan or scheme. *See State v. Hall*, 103 Wis.2d 125, 139, 307 N.W.2d 289, 295 (1981). A defendant is not prejudiced by joinder of two charges if the evidence of each crime would have been admissible as “other acts” evidence in a separate trial. *Id.* Whether the other acts evidence is admissible involves a two-step process: First, the court must determine that the evidence is being offered for a proper purpose under § 904.04(2), STATS. Second, the court must determine whether the prejudice substantially outweighs the probative value of the evidence. *See State v. Fishnick*, 127 Wis.2d 247, 254, 378 N.W.2d 272, 276 (1985). The probative value of the other acts evidence depends on its nearness in time, place and circumstance to the alleged crime or elements sought to be proved. *See State v. Speer*, 176 Wis.2d 1101, 1114, 105 N.W.2d 429, 433 (1993).

The trial court erred by joining the trials on the charge involving assault of a six-year-old boy with the charges involving the sixteen-year-old girl. Evidence of the sexual assault of the girl would not have been admissible at a separate trial on the charge involving the boy. The acts were so dissimilar that they would not tend to prove any of the exceptions set out in § 904.04(2), STATS. The trial court concluded that evidence of the sexual assault of the sixteen-year-old girl would tend to prove Smith’s motive, plan or scheme. We disagree. The only common motive for the offenses against the two victims is sexual gratification, a motive common to almost every sex act. The circumstances of these offenses were so different that they disclose no common plan or scheme. In addition to the differences in the victim’s age and sex, the crime against the six-year-old boy involved a single incident of sexual contact while Smith was babysitting in his own home. The alleged incident with the sixteen-year-old girl

eighteen months later involved repeated acts of forcible intercourse in Smith's car. The State suggests that each of these incidents took place in a private, secluded area where there was little chance of his actions being discovered. That is true of almost all sex acts, consensual and nonconsensual, and does not establish a common scheme or plan.

The trial court also suggested that the evidence of each sexual assault tended to show that Smith took advantage of a relationship of trust that he developed with his victims. The incidents involving the sixteen-year-old girl appear to be a classic "date rape" between people of comparable age. Smith's relationship with the boy more closely approximated that of a father-figure or role model. The dissimilarities between these events greatly exceed the similarities.

Nonetheless, we conclude that the error in joining these cases in a single trial was harmless because there is no reasonable possibility the misjoinder contributed to the conviction. *See State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). The jury acquitted Smith of the three counts involving the sixteen-year-old girl. It is highly unlikely that the jury became confused about which evidence related to which crime, or failed to separately consider the crimes. Furthermore, because there is overwhelming evidence of Smith's guilt on the charge involving the six-year-old boy, Smith is not entitled to a new trial from the misjoinder of the cases. *See State v. Leach*, 124 Wis.2d 648, 672-73, 370 N.W.2d 240, 253 (1985). The jury's finding that Smith sexually assaulted the boy was supported by Smith's confession. While he attempted to repudiate that confession at trial by claiming that the police officer forced him to sign the confession, the jury found that defense unpersuasive. The force Smith described consisted of a statement that he would not be charged. The jury could reasonably find that the confession was not "forced" out of Smith. Smith

corrected a detail in the confession before he signed it, showing that the officer had not forced him to sign something that was untrue.

The defense also called witnesses to establish a motive for the boy's mother to encourage him to fabricate these allegations. The witnesses testified that the boy's mother threatened three or four times to accuse Smith of molesting the child unless Smith's sister resumed a long-term relationship with the child's mother. This evidence explains the long delay in reporting the sexual assault to the police, but provides only weak evidence that the child fabricated the story. Smith was convicted on the testimony of the child, not his mother.

Smith argues that the verdicts reached after a relatively short deliberation indicate that the jury reached a compromise verdict. Nothing in the record supports that supposition. Rather, the jury apparently believed Smith's testimony that he had consensual sex with the girl. That testimony was supported by other witnesses who testified to displays of physical affection between Smith and the girl before and after the alleged assaults. The acquittal on the charges involving the sixteen-year-old girl reflects the jury's careful consideration of the evidence relating to the separate crimes.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

